

for minority and women-owned businesses on a service-specific basis, in each case considering the capital requirements and the expected build-out cost of the service. We agree with BET that in services with high entry costs, precluding publicly traded companies from receiving measures intended for minority and women-owned businesses may undermine our objective of ensuring the opportunity for these designated entities to participate in the provision of spectrum-based services.

131. As requested by BET, we clarify that the provisions for businesses owned by women and minorities are separate and distinct from the provisions for small businesses. Thus, women and minority-owned businesses may qualify for measures adopted for these entities irrespective of their size, and small businesses may qualify for small business provisions regardless of their ownership by minorities and women. And small businesses that are owned by members of minorities and/or women may qualify for provisions applicable to both groups.

132. Finally, in the general auction rules, we indicated that in determining designated entity eligibility we would consider all rights, warrants and options on a fully diluted basis, i.e., they will be treated as if already exercised.¹⁷⁹ We intend to maintain the existing rule of calculating these ownership interests on a fully diluted basis, since we expect that such ownership interests will almost always have the potential either to impact the ability of a designated entity to control a company or to diminish a designated entity's financial stake in the venture. However, in the rare circumstance where such ownership interests have no effect on a designated entity's ability to control a firm or to diminish the designated entity's financial stake, we will consider requests for waivers.¹⁸⁰ We note, however, that we expect such instances to be rare, and petitioners will be required to make an affirmative showing sufficient to overcome the presumption that such ownership interests should be calculated as if exercised for purposes of determining eligibility issues.

133. Petitions. AIDE and Cook Inlet propose stricter eligibility and anti-sham measures to avoid designated entity shams. Specifically, Cook Inlet proposes requiring that a designated entity maintain clear structural control of an entity in order to be eligible for designated entity provisions. In this regard, Cook Inlet argues that in limited partnerships, the general partner should be required to be a designated entity and restrictions should be imposed on the ability of other general partners to exercise management control. Cook Inlet also proposes that the Commission require designated entities to document their eligibility by attaching documentation to their long form application.

134. We agree with AIDE that in some instances stricter eligibility requirements are appropriate to ensure that only legitimate designated entities are the beneficiaries of the

¹⁷⁹ 47 CFR Sec. 1.2110 (b)(2).

¹⁸⁰ See 47 CFR Sec. 1.2110.

special provisions established under our rules. In particular, we clarify that, when an applicant or a licensee is a partnership, because each general partner generally has the ability to act on behalf of the partnership, all general partners in the license applicant must be designated entities in order to qualify for designated entity status. We believe that this clarification is consistent with the Commission's long-standing practice of attributing control in the context of partnerships to the general partners. This clarification will ensure that designated entities in partnerships retain de facto as well as de jure control.

135. In addition, we agree with AIDE that documentation of designated entity status should be submitted along with the applicants' long-form applications in order to enable the Commission to verify designated entity eligibility. Accordingly, we will require designated entities to substantiate their eligibility by describing on their long-form application how they satisfy the requirements for eligibility. We will also require designated entity applicants to list on their long-form application all agreements that effect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

136. In addition, if an applicant for designated entity status proves unqualified, and the Commission determines that the application for designated entity status involved willful misrepresentation or other serious misconduct, the Commission will impose severe penalties. These may include monetary forfeitures, revocation of licenses, and prohibition of participation in future auctions.

137. With respect to AIDE's proposal that clear structural control should be required to establish designated entity eligibility, we believe that as a general rule, our strict requirement that women and minority principals control the applicant and maintain a 50.1 percent voting interest (in a corporate applicant) and a 50.1 percent equity stake in the entity is sufficient to prevent "fronts" and to ensure that our provisions are only made available to legitimate qualified designated entities. However, we reserve the flexibility on a service-specific basis, taking into account the nature of the specific provisions applicable in that service, to adopt additional or different requirements for designated entity eligibility.¹⁸¹

¹⁸¹ For example, in the Fifth Report and Order we allowed minority or women-owned broadband PCS applicants to sell up to 75 percent of the company's equity to passive investors so long as the control groups retained control and 25 percent of the equity and each other investor owned less than 25 percent of the passive equity. We also established control group tests for small businesses and entities that wished to bid in certain blocks.

138. While we conclude that our requirement that control and substantial equity rest with minorities and/or women will generally be adequate to ensure that parties do not attempt to evade the statutory requirement to provide economic opportunities and ensure participation by businesses owned by these groups, we also reaffirm our commitment to investigate all allegations of fronts, shams or other methods used to try to evade our eligibility rules. In this regard, we remind parties that we will conduct random pre and post-auction audits to ensure that applicants receiving designated entity benefits are bona fide designated entities.

L. Small Businesses

139. Petitions. NTCA and USIN request that we amend the small business definition so that it can be flexibly modified in the context of a particular service. NTCA and USIN advocate that such flexibility is appropriate because the existing \$6 million net worth/\$2 million net income test is too low to reflect the capital-intensive nature of the broadband PCS business. NTCA asserts that most rural telephone companies are unable to meet this test even though they have few subscribers and very few employees. USIN states that the current definition discriminates against small rural telephone companies, and that the proper measure for small businesses in capital-intensive services is those with annual revenues of less than \$100 million.

140. Discussion. We agree with NTCA. In the Second Report and Order we relied on the Small Business Administration's (SBA) standard definition. The SBA definition permits an applicant to qualify for financial assistance based on a net worth not in excess of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million.¹⁸² The record in this proceeding reflected broad disagreement about the appropriate definition of small businesses. Many commenters, including the Chief Counsel for Advocacy of the SBA, argued that the SBA net worth/revenue definition was too restrictive and would exclude businesses of sufficient size to survive, much less succeed, in the competitive wireless communications marketplace. The SBA's Chief Counsel for Advocacy and Suite 12 Group advocated adoption of a revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel recommended that the revenue standard be raised to include firms that (together with affiliates) have less than \$40 million in revenue. The SBA Chief Counsel suggested that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.¹⁸³

¹⁸² 13 CFR 121.802.

¹⁸³ Some parties recommend using the SBA's 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is

141. Other parties indicated that the definition used by the Commission might impede the ability of small businesses to raise capital in anticipation of auctions. They noted that many small firms are soliciting investors to enable these firms to compete better in auctions, and argued that their designated entity status should not be jeopardized as a result. Thus, these commenters suggested, if the FCC adopts the SBA's net worth standard, the net worth valuation should relate back to the date of the PCS Final Report and Order (September 23, 1993).

142. In contrast, several commenters argue that the small business definition must be made more restrictive in order to prevent large firms from spinning off companies to compete as designated entities. In this regard, some parties recommend limiting provisions to those small businesses that were in existence for the previous two years.

143. In the Second Report and Order, we adopted the existing SBA net worth/net income size standard as the generic threshold for small businesses to qualify as designated entities because at that time we were unable to conclude that the other proposals suggested by commenters were superior to this established standard. However we acknowledged that for certain telecommunications industry sectors this standard may not be high enough to encompass those entities that require the benefits, but also have the financial wherewithal to construct and operate the systems. Accordingly, we indicated that this "threshold could be adjusted upward on a service-by-service basis to accommodate such situations." We also noted that we may modify the small business definition if the SBA changed its definition or the Commission determined that an alternative definition was more appropriate for capital intensive services.

144. In this regard, in the Fifth Report and Order we revised the definition of a small business set forth in the Second Report and Order to include entities with up to \$40 million in gross revenues, and we provided that these small businesses would be permitted to pool their resources and form consortia to bid in the entrepreneurs' blocks or to receive other small business benefits. We also adopted rules that allow small businesses and businesses owned by women and/or minorities to raise capital by selling passive ownership interests in their companies. Thus, for example, under certain conditions, businesses owned by women and minorities have the option of taking on one large passive partner (holding up to 49.9 percent of the enterprise) or selling a greater portion of their companies' equity (up to 75 percent of the equity) to passive investors in smaller increments. Either of these structures should

a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment outlined by Congress in the Budget Act. See, e.g., comments of LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

enhance the ability of these entities to obtain the necessary funding to meet long-term construction, operation and expansion goals.¹⁸⁴

145. Given the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each, we conclude that it is more appropriate to define the eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements of each particular service in establishing the appropriate threshold. Therefore we will amend our generic auction rules to replace the small business definition with a provision enabling the Commission to establish a small businesses definition in the context of each particular service.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

146. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and Purpose of, this Action

147. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, see generally 5 U.S.C. § 603, within the Notice of Proposed Rule Making in this proceeding, and published a Final Regulatory Flexibility Analysis within the Second Report and Order (at ¶¶ 299-302). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

B. Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

148. No comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

149. Although, as described in (B) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis, the Second Report and Order addressed at length the general policy considerations raised as a result of the Commission's new auction authority.


¹⁸⁴ See Fifth Report and Order at ¶185.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

150. Accordingly, IT IS ORDERED, that the petitions for reconsideration ARE GRANTED to the extent described above and DENIED in all other respects, and that the petition of William E. Zimsky IS DISMISSED as moot.

151. IT IS FURTHER ORDERED, that Part 1 of the Commission's Rules IS AMENDED as set forth in Appendix B, attached. IT IS ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

FILINGS IN RESPONSE TO THE SECOND REPORT AND ORDER

Petitions

Anchorage Telephone Utility (ATU, Anchorage)
John G. Andrikopoulos, et al. (Andrikopoulos)
The Association of Independent Designated Entities (AIDE)
Black Entertainment Television Holdings, Inc. (BET)
Dennis C. Brown and Robert H. Schwaninger, Jr. (Brown & Schwaninger)
Blooston, Mordkofsky, Jackson & Dickens (Blooston)
Cable and Wireless, Inc. (CWI)
Cook Inlet Region, Inc. (CIRI, Cook Inlet)
GTE Service Corporation and Affiliates (GTE)
Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups)
MCI Telecom. Corp. (MCI)
Millin Publications, Inc. (Millin)
The National Assoc. of Business and Educational Radio (NABER)
The National Telephone Cooperative Association (NTCA)
The Rural Cellular Association (RCA)
South Dakota Network, Inc. (SDN)
Southwestern Bell Corporation (SBC)
Telephone and Data Systems, Inc. (TDS)
Thumb Cellular Limited Partnership (Thumb Cellular)
U.S. Intelco Networks, Inc. (USIN)
William E. Zimsky (Zimsky)

Oppositions and Comments

Black Entertainment Television Holdings, Inc. (BET)
Quentin L. Breen (Breen)
GTE Service Corp. and Affiliates (GTE)
MCI Telecom. Corp. (MCI)
Pacific Bell and Nevada Bell (Pacific Bell)
Telephone and Data Systems, Inc. (TDS)
Tri-County Telephone Company, Inc. (Tri-County)
The United States Telephone Association (USTA)

Replies

Anchorage Telephone Utility (ATU, Anchorage)

The Association of Independent Designated Entities (AIDE)

Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups)

The National Telephone Cooperative Association (NTCA)

The Rural Cellular Association (RCA)

APPENDIX B

FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 1, 4(i), 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 151, 154, and 303, unless otherwise noted.

2. Subpart Q of Part 1 is amended to read as follows:

Subpart Q - Competitive Bidding Proceedings

AUTHORITY: 47 U.S.C. 309(j).

GENERAL PROCEDURES

§ 1.2101 Purpose

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

§ 1.2102 Eligibility of Applications for Competitive Bidding

(a) Mutually exclusive initial applications in the following services or classes of services are subject to competitive bidding:

- (1) Interactive Video Data Service (see 47 CFR Part 95, Subpart F). This subsection does not apply to applications which were filed prior to July 26, 1993;
- (2) Marine Public Coast Stations (see 47 CFR Part 80, Subpart J);
- (3) Multipoint Distribution Service and Multichannel Multipoint Distribution Service (see 47 CFR Part 21, Subpart K). This subsection does not apply to applications which were filed prior to July 26, 1993;
- (4) Exclusive Private Carrier Paging above 900 MHz (see 47 CFR Part 90, Subpart P and the Private Carrier Paging Exclusivity Report and Order, 8 FCC Rcd 8318, 58 FR 62289 (Nov 26, 1993));
- (5) Public Mobile Services (see 47 CFR Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio Service. This subsection does not apply

(5) Public Mobile Services (see 47 CFR Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio Service. This subsection does not apply to applications in the cellular radio service, such as cellular unserved area applications, that were filed prior to July 26, 1993;

(6) Specialized Mobile Radio Service (SMR) (see 47 CFR Part 90, Subpart S) including applications based on finder's preferences for frequencies allocated to the SMR service (see 47 CFR Section 90.173);

(7) Personal Communications Services (PCS) (see 47 CFR Part 24); and

NOTE: To determine the rules that apply to competitive bidding in the foregoing services, specific service rules should also be consulted.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Applications for renewal of licenses;

(2) Applications for modification of license; provided, however, that the Commission may determine that applications for modification that are mutually exclusive with other applications should be subject to competitive bidding;

(3) Applications for subsidiary communications services. A "subsidiary communications service" is a class of service where the signal for that service is indivisible from that of the main channel signal and that main channel signal is exempt from competitive bidding under other provisions of these rules. See, e.g., § 1.2102(c) (exempting broadcast services). Examples of such subsidiary communications services are those transmitted on subcarriers within the FM baseband signal (see 47 CFR § 73.295), and signals transmitted within the Vertical Blanking Interval of a broadcast television signal; and

(4) Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are (a) point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office and (b) point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.

(c) Applications in the following services or classes of services are not subject to competitive bidding:

(1) Alaska-Private Fixed Stations (see 47 CFR Part 80, Subpart O);

- (2) Broadcast radio (AM and FM) and broadcast television (VHF, UHF, LPTV) under 47 CFR Part 73;
- (3) Broadcast Auxiliary and Cable Television Relay Services (see 47 CFR Part 74, Subparts D, E, F, G, H and L and Part 78, Subpart B);
- (4) Instructional Television Fixed Service (see 47 CFR Part 74, Subpart I);
- (5) Maritime Support Stations (see 47 CFR Part 80, Subpart N);
- (6) Marine Operational Fixed Stations (see 47 CFR Part 80, Subpart L);
- (7) Marine Radiodetermination Stations (see 47 CFR Part 80, Subpart M);
- (8) Personal Radio Services (see 47 CFR Part 95), except applications filed after July 26, 1993, in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F);
- (9) Public Safety, Industrial/Land Transportation, General and Business Radio categories above 800 MHz , including finder's preference requests for frequencies not allocated to the SMR service (see 47 CFR Section 90.173), and including, until further notice of the Commission, the Automated Vehicle Monitoring Service (see 47 CFR § 90.239);
- (10) Private Land Mobile Radio Services between 470-512 Mhz (see 47 CFR Part 90, Subparts B-F), including those based on finder's preferences, see 47 CFR Section 90.173;
- (11) Private Land Mobile Radio Services below 470 MHz (see 47 CFR Part 90, Subparts B-F) except in the 220 MHz band (see 47 CFR Part 90, Subpart T), including those based on finder's preferences (see 47 CFR Section 90.173); and
- (12) Private Operational Fixed Services (see 47 CFR Part 94).

§ 1.2103 Competitive Bidding Design Options

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in the Second Report and Order in PP Docket No. 93-253, FCC 94-61, 59 FR 22980 (May 4, 1994), adopted March 8, 1994, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

- (1) Single round sealed bid auctions (either sequential or simultaneous)
- (2) Sequential oral auctions

(3) Simultaneous multiple round auctions

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 1.2104 Competitive Bidding Mechanisms

(a) Sequencing. The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) Minimum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish suggested minimum opening bids on a service-specific basis.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) Withdrawal, Default and Disqualification Penalties. As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to § 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront

payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

§ 1.2105 Bidding Application and Certification Procedures; Prohibition of Collusion

(a) Submission of Short Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate filing fee set forth by Public Notice. Unless otherwise provided by Public Notice, the Form 175 need not be accompanied by an upfront payment (see Section 1.2106 of this part).

(1) All Form 175s will be due:

(i) on the date(s) specified by Public Notice; or

(ii) in the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR Section 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The Form 175 must contain the following information:

- (i) Identification of each license on which the applicant wishes to bid;
- (ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;
- (iii) The identity of the person(s) authorized to make or withdraw a bid;
- (iv) If the applicant applies as a designated entity pursuant to § 1.2110 of these rules, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110 of the Commission's Rules;
- (v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;
- (vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;
- (vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;
- (viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.
- (ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to subsection (viii) regarding the

amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

NOTE: The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Form 175.

(1) Any Form 175 that is not signed or otherwise does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) Prohibition of Collusion.

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this subsection, after the filing of short-form applications, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other bidders until after the high bidder makes the required down payment, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Section 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for the same license. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for the same license.

§ 1.2106 Submission of Upfront Payments

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. No interest will be paid on upfront payments.

(b) Upfront payments must be made either by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

(e) In accordance with the provisions of subsection (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

§ 1.2107 Submission of Down Payment and Filing of Long-Form Applications

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within five (5) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single

round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer or cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under § 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within five (5) business days of grant of their application. See § 1.2110(e)(1) and (2) of this subpart. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. No interest will be paid on any down payment.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by § 1.2105(a)(1)(b)). For example, if the applicant is a high bidder for a license in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F), the long form application will be submitted on FCC Form 574 in accordance with Section 95.815 of the Rules. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to:

Office of the Secretary
Federal Communications Commission
Attention: Auction Application Processing Section
1919 M Street, N.W., Room 222
Washington, D.C. 20554

An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in § 1.2104 of the Commission's Rules.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to § 1.2105.

§ 1.2108 Procedures for Filing Petitions To Deny Against Long- Form Applications

(a) Where petitions to deny are otherwise provided for under the Act or the Commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within thirty (30) days after the Commission gives public notice that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such opposition and replies will be those provided in § 1.45 of these Rules.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold an evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

§ 1.2109 License Grant, Denial, Default, and Disqualification

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default penalty specified in § 1.2104(g)(2). In such event, the Commission may either re-auction the license

to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in § 1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 1.2110 Designated Entities

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Definitions.

(1) **Small businesses.** The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) **Businesses owned by members of minority groups and/or women.** Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) Rural telephone companies. A rural telephone company is any local exchange carrier, including affiliates (as defined in 1.2110 (b)(4)), with 100,000 access lines or fewer.

(4) Affiliate. (1) An individual or entity is an *affiliate* of (a) an applicant or (b) a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity --

(i) directly or indirectly controls or has the power to control the applicant , or

(ii) is directly or indirectly controlled by the applicant, or

(iii) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) has an "identity of interest" with the applicant.

(2) Nature of *control* in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management

control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(i) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(ii) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that (A) the family members are estranged, (B) the family ties are remote, or (C) the family members are not closely involved with each other in business matters.

Example: A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) Affiliation through stock ownership.

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how

far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules.

(e) The Commission may award bidding credits (i.e., payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(f) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(g) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(h) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both de facto and de jure control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(i) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(j) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

§ 1.2111 Assignment or transfer of control: unjust enrichment

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three